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AUTHOR	Patin, Charles L., Jr.; Gordon, William M.
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ABSTRACT

The good-faith requirement in school desegregation was initially discussed by the United States Supreme Court in "Brown II." However, it was not until recently, in "Freeman v. Pitts," that the Court was to provide a definitive statement as to the meaning of the requirement, indicate the need for specific findings with respect to it, and announce it as a prerequisite for school unitary status. After giving historical background on this requirement, this paper discusses actions school districts should take to demonstrate good faith. Some steps include taking voluntary action to increase levels of desegregation in schools, implementing majority-to-minority transfers, instituting magnet programs designed to attract a desegregated student body, and offering racially integrated "experience programs." Schools seeking unitary status can maintain a history of good-faith implementation of the court's orders; conduct a compliance audit; and hold discussions with stakeholders, interested citizens, the press, and the media to provide information, assess, and promote the climate within the school district as it relates to desegregation activities. An attachment describes the origin and development of the good-faith requirement in "Freeman v. Pitts," and discusses the kinds of actions school districts should undertake in its aftermath. (RT)

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The "Good Faith" Requirement in School Desegregation Cases.

Charles L. Patin, Jr.
William M. Gordon

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THE "GOOD FAITH" REQUIREMENT IN SCHOOL DESEGREGATION CASES

by

Charles L. Patin, Jr., J.D.
and
William M. Gordon, Ed. D., J.D.

(A Summary of the Proposed Presentation)

The good faith requirement was initially discussed by the United States Supreme Court in *Brown II*. However, it was not until recently, in *Freeman v. Pitts,* that the Court was to provide a definitive statement as to the meaning of the requirement, the need for specific findings with respect to it, and announce it as a prerequisite for unitary status.

This presentation traces the development of the requirement and discusses actions school districts should take to demonstrate good faith.

EA032373

THE "GOOD FAITH" REQUIREMENT IN SCHOOL DESEGREGATION CASES

I. HISTORICAL BACKGROUND: THE ORIGIN AND DEVELOPMENT OF THE "GOOD FAITH" REQUIREMENT

***Brown v. Board of Education of Topeka, Kansas* (*Brown I*)**, 347 U.S. 483, 98 L. Ed. 873, 74 S. Ct. 686 (1954). *Held:*

— In the field of public education the doctrine of "'separate but equal' has no place."

> ***Summary:*** *Brown I* declared separate educational facilities and opportunities for white and black students unconstitutional as in violation of the equal protection guarantees of the Fourteenth Amendment.

***Brown v. Board of Education of Topeka, Kansas* (*Brown II*)**, 349 U.S. 237, 99 L. Ed. 1083, 75 S. Ct. 753 (1955). *Held:*

— All provisions of federal, state and local laws requiring or permitting racial discrimination in the area of public education must yield to the fundamental principle in the Fourteenth Amendment that racial discrimination in public education is unconstitutional.

— School authorities are charged with primary responsibility for converting from racially segregated school systems to unitary school systems freed of racial discrimination.

— Federal district courts must consider whether the action of school authorities constitutes *good faith* implementation of the governing principles of the Fourteenth Amendment. In accessing *good faith* implementation, the federal district courts may consider problems related to administration, arising from the a) physical condition of the school plant (facilities), b) the school transportation system, c) personnel (assignments of administrators, teachers and support staff), d) revision of school districts and attendance areas into compact units to achieve a system of determining

admission to public schools on a nonracial basis (student assignments), and e) revision of local laws and regulations which may be necessary in solving the foregoing problems.

— Federal jurisdiction is to be retained in school desegregation cases until such time as the federal district courts are satisfied that school districts have converted to racially nondiscriminatory systems.

> ***Summary:*** *Brown II* mandated *good faith* action to eliminate segregation in the areas of facilities, transportation, administrative, faculty and staff assignments, and student assignments. It recognized the need for continuing federal supervision of school districts until such time as the vestiges of prior discrimination are eliminated.

Green v. County School Board of New Kent County, 391 U.S. 440, 20 L. Ed. 2d 716, 88 S. Ct. 1689 (1969) — *Held:*

— The burden is upon local school authorities to come forward with a plan that promises realistically to work, and promises realistically to work *now*.

— The federal district courts must determine whether school districts are acting in *good faith* and whether proposed desegregation plans have real prospects of dismantling state imposed segregation at the earliest practicable date.

> ***Summary:*** School district must act in *good faith* to eliminate racial discrimination in public education in the areas of a) student assignments, b) administrative, faculty and staff assignments, c) transportation, d) extracurricular activities, and e) facilities. (*Green*, it should be noted, expanded the areas initially mentioned in *Brown II* by adding extracurricular activities.)

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 28 L. Ed. 2d 554, 91 S. Ct. 1267 (1971). *Held:*

— The nature and extent of the violation determines the scope of the remedy in a school desegregation case.

— The exercise of a federal district court's authority in a school desegregation case is based upon the violation and its remedial powers must be tailored to address the violation. (Stated differently, once the violation is remedied, there no longer exists a basis for continued federal involvement.)

—*Swann* adds to the *Green* factors the requirement for an equitable distribution of the resources of a school district. (This primarily pertains to the distribution of equipment and materials of instruction.)

> ***Summary:*** *Swann* articulates the extent of a federal district court's authority to address violations and enter remedial orders for elimination of racial discrimination in public education. It adds resource allocation as an area of the operation of a school system in which discrimination must be eliminated.

Board of Education of Oklahoma City v. Dowell, 498 U.S. 237, 112 L. Ed. 2d 715, 111 S. Ct. 630 (1991). *Held:*

— School desegregation orders are not intended to operate in perpetuity.

— In determining whether a desegregation plan ordered by a federal district court should be dissolved and federal supervision terminated, the court must address "whether the Board has complied in *good faith* with the desegregation decree since it was entered, and whether the vestiges of past discrimination ha[ve] been eliminated to the extent practicable."

— In determining whether the vestiges of past segregation have been eliminated to the extent practicable, "the District Court should look not only at student assignments, but 'to every facet of school operations."

> ***Summary:*** ***Dowell*** underscores the need that school districts implement desegregation plans in *good faith.* It also puts to rest the contention that a school district which once operated a dual education system is only obligated to comply either with the court's desegregation plan or the areas discussed in ***Green*** and ***Swann***. Under ***Dowell***, a school district seeking unitary status, dissolution of the injunctive decree and a termination of the court's supervision, must show both that it has complied in *good faith* with the court's desegregation plan for a reasonable period

— The exercise of a federal district court's authority in a school desegregation case is based upon the violation and its remedial powers must be tailored to address the violation. (Stated differently, once the violation is remedied, there no longer exists a basis for continued federal involvement.)

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of time *and* that it has eliminated discrimination to the extent practicable in all areas of its operations as cited in ***Green*** and ***Swann***.

Freeman v. Pitts, 503 U.S. 467, 118 L. Ed 2d 108, 112 S. Ct. 1430 (1992).

Held:

— Federal judicial supervision in a desegregation case may be incrementally relinquished before full compliance has been achieved in every area of school operations.

— Incremental relinquishment of a federal district court's supervision must be exercised in a manner consistent with the purposes and objectives of its equitable power.

— In ordering partial relinquishment of judicial supervision, the court must determine: "[a] whether there has been full and satisfactory compliance with the decree in those aspects of the system where supervision is to be withdrawn; [b] whether retention of judicial control in necessary or practicable to achieve compliance with the decree in other facets of the school system; and [c] whether the school district has demonstrated, to the public and to the parents and students of the once disfavored race, its good faith commitment to the whole of the court's decree and to those provisions of the law and the constitution that were the predicate for judicial intervention in the first instance."

— One of the "prerequisites to relinquishment of [judicial] control *in whole or part* is that a school district has demonstrated its commitment to a course of action that gives full respect to the equal protection guarantees of the Constitution." (emphasis supplied.)

—Particular attention must be given to the school system's record of compliance. "A school system is better positioned to demonstrate its good-faith commitment to a constitutional course of action when its policies form a consistent pattern of lawful conduct directed to eliminating earlier violations."

— Federal district courts must make "more specific findings" as to a school district's *good faith*. This is because a history of *good faith* compliance "enables the district court to accept the school board's representation that it has accepted the principle of racial equality and will not suffer intentional discrimination in the future."

— ***Freeman*** further points out that it is appropriate for a federal district court "to inquire whether other elements [of racial discrimination] ought to be identified, and to determine whether minority students [are] being disadvantaged in ways that require the formulation of new and further remedies to insure full compliance with the court's decree." (In ***Freeman***, the district court found the "quality of education" constituted another area of the operation of the school system in which additional remedies were required. This area in ***Freeman*** dealt with the disproportionate assignment of better educated and more experienced teachers in schools with disproportionately high percentages of white students, and because per pupil expenditures in majority white schools exceeded per pupil expenditures in majority black schools.)

> ***Summary:*** ***Freeman*** recognized that partial unitary status is available to a school district which has achieved unitary status in one or more but not all of the areas cited in ***Green*** and ***Swann*** where full and satisfactory compliance is found, granting of partial unitary status in one or more areas will not impede the achievement of compliance in the remaining areas of its operations, and where the school district has acted in *good faith* such that its actions have demonstrated, to the public and to those on whose behalf the lawsuit was filed, a commitment to the *whole* of the court's orders and to those provisions of the law and the Constitution which were the predicate for judicial intervention in the first instance. ***Freeman*** further recognized that additional remedies, in areas such as the quality of education, might be ordered in furtherance of the court's prior orders.

II. SUMMARY OF REQUIREMENTS FOR UNITARY STATUS

— *Good faith* implementation of the whole of the court's decree;

— A record of compliance with the orders of the court;

— Policies forming a consistent pattern of lawful behavior; and

— Elimination of discrimination to the extent practicable in all areas of the operations of a school system, comprised of a) student assignments, b) administrative, faculty and staff assignments, c) transportation, d)

extracurricular activities, d) facilities, e) resource allocation, and f) the quality of education.

III. THE *GOOD FAITH* REQUIREMENT

— Beginning with ***Brown I***, each of the major decisions of the United States Supreme Court has emphasized the need that a school district act in *good faith* to disestablish prior dual systems of education for the races and in efforts to implement desegregation decrees of the federal district courts.

— ***Freeman***, decided 37 years after ***Brown I***, represents the Supreme Court's culminating statement on the meaning of the *good faith* requirement. *Good faith* entails:

> a demonstrated commitment to a course of action that gives full respect to the equal protection guarantee of the Fourteenth Amendment;
>
> the adoption of policies forming a consistent pattern of lawful conduct directed to eliminating earlier violations;
>
> a history of compliance with the orders of the court;
>
> action sufficient to demonstrate, to the public and to the parents and students of the once disfavored race, a commitment to the whole of the court's decree and to those provisions of the law and the Constitution that were the predicate for judicial intervention in the first instance.

IV. SCHOOL DISTRICT ACTIONS DEMONSTRATING *GOOD FAITH*

— Voluntary action to increase levels of desegregation in schools: In ***Freeman*** it is noted that over a period of about two decades the school district made 170 changes to student attendance zones;

— Implementation of majority-to-minority student transfers;

— Institution of magnet programs designed to attract a desegregated student body. [This entails a) the offering of quality educational programs, b) which are not

duplicated in regular and comprehensive school, c) with necessary materials of instruction and equipment, d) which are staffed with competent school-site administrators and qualified faculties (certified and experienced teachers who have undergone necessary training];

— Offering of racially integrated "experience programs;"

— Infrequent and limited judicial intervention into the affairs of a school district.

— An extensive period of compliance with the court's decree;

— A history of having never been found in violation of court order;

— A history of having never been sanctioned;

— A history of extensive consultation with the black community and plaintiff representatives;

— Adoption of a multi-cultural curriculum for students in all grades;

— Special in-servicing for teachers to better enable them to deal with diverse student populations;

— Adoption of policies forming a consistent pattern of lawful conduct;

— A record of having never failed to comply with an order of the court;

— Taking of actions to further desegregation above and beyond what was required in the court's order;

— Actions to maintain levels of desegregation in schools within the school system.

> ***Summary:*** A finding of *good faith* requires *voluntary compliance* with the orders of the court and the taking of *voluntary actions* to further levels of desegregation. *Voluntary action,* taken without judicial compulsion, serves to enable a court to accept a school district's representation that it has

accepted the principle of racial equality and will not suffer intentional discrimination in the future if judicial supervision is relinquished. It also serves to demonstrate, to the public and to those on whose behalf the lawsuit was filed, a commitment to those provisions of the law the Constitution that were the predicate for judicial intervention in the first instance.

V. STEPS TO BE TAKEN TOWARD SEEKING UNITARY STATUS

— A history of *good faith* implementation of the court's orders;

— Retention of competent professionals: an attorney with desegregation litigation experience and a desegregation consultant;

— Compilation of prior court orders and school district reports;

— Compilation of data showing compliance with prior court orders and elimination of vestiges of past discrimination;

— Conduct a compliance audit (this will normally be done by the desegregation consultant or attorney);

— Discussions with the parties, interested citizens, and the press and media to provide information and assess the climate within the school district as it relates to desegregation activities and may assist, where necessary, with the design of additional remedial measures in any areas in which full and satisfactory compliance, as yet, may not have been achieved;

— Review of school board policies and the making of necessary revisions.

ATTACHMENT I

"SCHOOL DESEGREGATION CASES: THE 'GOOD FAITH' REQUIREMENT

BY

CHARLES L. PATIN, JR., J.D.
AND
WILLIAM M. GORDON, Ed. D., J.D.

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SCHOOL DESEGREGATION CASES: THE "GOOD FAITH" REQUIREMENT

By Charles L. Patin, Jr.
and
Dr. William M. Gordon[1]

Stephen Furr, a member of the Rapides Parish School Board, aptly commented following a discussion about the "good faith" requirement in school desegregation cases that:

> *The "good faith" requirement may be the single most difficult of all the requirements of a unitary system. It demands a change in attitude which must be evidenced in the words and actions of the members of the Board and all those connected with the school system.* (emphasis supplied.)

In the wake of the United States Supreme Court's 1992 decision in *Freeman v. Pitts,*[2] the underlying test as to whether a school district has operated in "good faith" and is entitled to the entry of a judgment terminating judicial supervision in a school desegregation case is

> *whether the school district has demonstrated, to the public and to the parents and students of the once disfavored race, its good faith commitment to the whole of the court's decree and to those provisions of the law and the constitution that were the predicate for judicial intervention in the first instance."*[3] (emphasis supplied.)

Freeman's test, its origin and development, and a discussion of the kinds of actions school districts should undertake in its aftermath form the subject matter of this article.

THE ORIGIN AND DEVELOPMENT OF THE GOOD FAITH REQUIREMENT IN *FREEMAN V. PITTS*

The origin of the "good faith" requirement can be traced to the United States Supreme Court's decision in *Brown II.*[4] There the Court commanded "good faith compliance at the earliest practicable date[,]"[5] with its landmark decision in *Brown I.*[6] *Brown I* declared state imposed segregation in the field of public elementary and secondary education unconstitutional as in violation of the guarantees in the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Brown II,* decided during the following term of the Court, placed primary responsibility upon local school districts to undertake necessary action to convert to unitary systems "with all deliberate speed"[7] and charged federal district courts with the responsibility of assessing "whether the action of local school authorities constitutes good faith implementation of the governing constitutional principles[]" elucidated in *Brown I.*[8] It also directed governments at all levels to undertake affirmative steps to dismantle laws requiring or permitting segregation in the area

of public education. The Court observed that "[a]ll provisions of federal, state and local law requiring or permitting such discrimination must yield to [the principle that racial discrimination in public education is unconstitutional]."[9]

Implicit in *Brown II* was an expectation that local school districts would come forward with plans to establish unitary systems and that states would adopt legislation to repeal statutes requiring separate educational opportunities and facilities for the races. From its inception, therefore, "good faith" envisioned that *voluntary* action would be taken by local school district and state officials to comply with the rule of law in *Brown I* and the mandate in *Brown II*.

In most, if not all, instances the initial response of school districts "to the mandate in *Brown II* was an all too familiar one. Interpreting 'all deliberate speed' as giving latitude to delay steps to desegregate,"[10] school districts undertook virtually no action to convert to unitary systems in the decade following *Brown II*.

But the time for "all deliberate speed" was drawing to an end. In *Green v. County School Board of New Kent County,*[11] decided just over a decade after *Brown II,* the Court stated "the time for mere 'deliberate speed' has run out[.]"[12] "The burden on a school board today is to come forward with a plan that promises realistically to work, and promises to realistically work *now.*[13] (emphasis by the Court.) The *Green* Court observed

> It is incumbent upon the school board to establish that its proposed plan promises meaningful and immediate progress toward disestablishing state-imposed segregation. It is incumbent upon the district court to weigh that claim in light of the facts at hand and in light of any alternatives which may be shown as feasible and more promising in their effectiveness. Where the court finds the board to be acting in *good faith* and the proposed plan to have real prospects for dismantling the state-imposed dual system "at the earliest practicable date," then the plan may be said to provide effective relief. Of course, the availability to the board of other more promising courses of action may indicate a lack of good faith[.][14] (emphasis supplied.)

Green went on to identify areas or facets of the operations of school districts in which prior state sanctioned discrimination must be eliminated. These areas or facets in which *vestiges* of prior dual education systems for the races lingered were said to be comprised of student assignments, administrative, faculty and staff assignments, extra-curricular activities, transportation, and facilities. Discrimination in these areas was to be eliminated "root and branch."[15] Subsequent cases expanded these areas so as to include resource allocations, as addressed in *Swann v. Charlotte-Mecklenburg Board of Education*[16] and the right to a "quality education,"[17] as discussed in *Freeman.* These areas may be said in a practical way to constitute what we understand today as the "*Green* Factors." "The *Green* factors are a measure of the racial identifiability of schools in a system that

is not in compliance with *Brown*[.]"[18]

The expanding role of federal district courts, foreshadowed in *Green,* was to come to fruition in *Swann.* The *Swann* Court announced where "school authorities fail in their affirmative obligations under [*Brown II* and *Green*], judicial authority may be invoked."[19] This language formally ushered in the era of federally imposed school desegregation orders. The power of federal district courts to fashion school desegregation orders through their equity jurisdiction came with the concomitant obligation that school districts implement them in *good faith.* The good faith requirement of *Brown II* was thus expanded. "Good faith" could be demonstrated not only through self-initiated voluntary action but also through the implementation of the orders of courts sufficient to demonstrate a *good faith* commitment to the principles of equality in the Fourteenth Amendment.

The next major developmental step was to come decades later in *Board of Education of Oklahoma City v.Dowell.*[20] There the Court observed that the issue of whether a school district should be declared unitary, and judicial supervision terminated, must turn on whether a school district has implemented "in good faith . . . the desegregation decree since it was entered, *and whether the vestiges of past discrimination [have] been eliminated to the extent practicable.*"[21] (emphasis supplied.) The requirement that *all* vestiges of past discrimination be eliminated to the extent practicable formally recognized what to that point in time had been more or less implicit in the cases — that is say a school district's good faith must be assessed in light of its policies and action as they relate to compliance with the remedial measures in orders of the court, *any* remaining *Green* Factors which were not addressed in those orders, and any other facets of the operation of a school district in which other *vestiges* of discrimination might still exist.[22]

Dowell clarified whatever ambiguity earlier cases might have interjected into the analysis federal district courts were to employ in approaching a school district's motion for unitary status. Mere compliance with the verbage of a federal school desegregation order limiting remedial actions to less than all of the *Green* Factors would not suffice. The requisite showing of good faith also must involve a judicial finding that a school district has eliminated past discrimination in *all facets of its operations to the extent practicable.*

Dowell, therefore, demonstrated a continuing commitment by the Court to the principles it had earlier announced in *Brown I,* and the mandate and requirements in *Brown II, Green* and *Swann.* Even though language in many of the older federal school desegregation orders was limited to specific remedial measures, usually in the areas of student and faculty and staff assignments, *Dowell* reiterated a unitary school system is one in which *all vestiges of prior discrimination have been eliminated to the extent practicable.*

On the heels of *Dowell* came *Freeman.* It underscored what had been said a year earlier in *Dowell*: "a school district that was once dual must be examined in all of its facets, . . . when the question is whether the district court's remedial control ought to be modified, lessened, or withdrawn."[23]

But *Freeman's* pronouncements on good faith went much further than prior case law and were to firmly entrench good faith as an essential requirement of a unitary system. *Freeman* recognized good faith compliance as "*one of the prerequisites to relinquishment of* [judicial] *control*[.]"[24] A good faith commitment to the entirety of a school district's desegregation plan was viewed as necessary "in order to insure that the principal wrong of the *de jure* system, the injuries and stigma inflicted upon the race disfavored by the violation, [would be] no longer present."[25] This finding in turn requires a showing by a school district sufficient to "demonstrate[], to the public and to the parents and students of the once disfavored race, its good faith commitment to the whole of the court's decree and to those provisions of the law and the constitution that were the predicate for judicial intervention in the first instance."[26] Only a *voluntary* change of attitude, evidenced in the words and actions of the members of a school board and all those connected with a school system, is sufficient to make this showing.

It is not surprising, therefore, that the Court in *Freeman* observed that "[a] history of good-faith compliance" is necessary in order that a federal district court may "accept [a] school board's representation that it has accepted the principle of racial equality and will not suffer intentional discrimination in the future."[27] Moreover,

> [c]ourts have recognized that the mere adoption of a racially neutral remedial plan is not tantamount to desegregation. Thus, where a court has reason to believe that *a discriminatory animus still taints local decisionmaking*, it may be appropriate for the court to retain jurisdiction for some period after neutral procedures have been implemented.[28] (citations omitted; emphasis supplied.)

Accordingly, a good faith showing cannot be based upon a temporary ritualistic change in behavior on the eve of filing a motion for unitary status. A pattern of dedication to the whole of the court's orders and to the constitutional principles embodied in the Fourteenth Amendment must be shown for a "reasonable period of time."[29] The case law appears to suggest that a "reasonable period of time" consists of at least three years from the commencement of the implementation of a desegregation plan.[30]

Freeman, therefore, may be viewed as a culminating step in the Court's development of the "good faith" requirement; a development which has spanned nearly four decades. Its essential aspects, traceable to *Brown II's* call for *voluntary* action and judicial oversight, remain firmly intact. What *Freeman* adds is a requirement that a specific judicial finding be made that a school district has taken sufficient and consistent action for a reasonable period of time to convey and demonstrate a) a change of attitude to those on whose behalf the lawsuit was brought, and b) an acceptance of Fourteenth Amendment principles sufficient to suggest to the court that if judicial supervision is relinquished the school district will not likely return to its former discriminatory ways.

It must be remembered that the jurisdiction of federal courts in school desegregation cases is derived through their equity jurisdiction. "Clean hands," a cornerstone tenet of equity, must be

shown by a school district seeking relief from a school desegregation order. A school district's clean hands can only be shown through compliance with the orders of the court and an acceptance of the principles embodied within the Fourteenth Amendment sufficient to demonstrate "to the public and to the parents and students of the once disfavored race, its good faith commitment to the whole of the court's decree and to those provisions of the law and the constitution that were the predicate for judicial intervention in the first instance." Only with a change in attitude evidencing a commitment to the principle of equality of educational opportunities for *all* children is such a demonstration possible.

ACTION WHICH DEMONSTRATES GOOD FAITH

"A school system is better positioned to demonstrate its good-faith commitment to a constitutional course of action when its policies form a consistent pattern of lawful conduct directed to eliminating earlier violations[.]"[31] Accordingly, school boards should have all existing policies in the areas of student assignments, administrative, faculty[32] and staff assignments, extra-curricular activities, transportation, facilities, and resource allocations reviewed to determine whether they comport with the requirements of *Green, Swann, Singleton*[33] and *Freeman*. Where policies do not exist, they should be *voluntarily* adopted and submitted to the parties for review and comment and to the court for approval.

In addition to policies designed to address *Green* Factors *per se*, there will likely be a need to consider adoption of policies addressing student discipline, teacher recruitment, harassment of students because of race or color, measures to increase minority participation in gifted and talented programs and other advanced courses, parental and community involvement practices and procedures, and perhaps other areas as well. The need for these more particularized policies will depend upon the facts in a given case.

Other action may be necessary as well. In this regard, *Freeman* and its progeny offer helpful examples. *Freeman* involved a motion for unitary status by the DeKalb County School District (hereinafter referred to as the "DCSD") which had operated under federal supervision since 1969. Partial unitary status was granted in the area of student assignments, and three other areas as well.[34] Because of the obvious significance of student assignments, the Court's reasoning in this area will be examined more closely. It offers excellent examples of actions school districts can take to demonstrate good faith.

At the time of the filing of the motion for unitary status, approximately 73,000 students were enrolled in the DCSD in grades kindergarten through twelve. Over the ensuing years preceding the filing of the unitary status motion in 1986, the DCSD had experienced significant changes in the racial composition of its student population. The school district's overall resident population had grown from about 70,000 residents to approximately 450,000 persons in about a thirty year span. The racial composition of the student population had grown from a little under six percent black in 1969 to 47 percent black in 1986. Remarkable demographic changes occurred as well. The northern portion of the school district had become predominately white, while the southern portion had

become predominately black.

Mindful of the "continuing" nature of the duty to desegregate,[35] the DCSD had made "about 170" boundary line changes to its student attendance zones since the filing of the school desegregation lawsuit.[36] Only three of the 170 student attendance zone changes were found to have had even a partial segregative effect.[37]

The school district had initiated a majority-to-minority ("M-to-M) student transfer policy in 1972 to promote voluntary student transfers to increase levels of desegregation and minimize racial isolation. M-to-M transfers permit a student whose race is in the majority in his/her student attendance zone school to transfer to a school in another student attendance zone in which his/her race will be in the minority. In general, M-to-M transfers permit black students attending predominately black schools to transfer to predominately white schools until the racial composition of the receiving school reaches 50 percent white and 50 percent black or some other percentage depending upon school board policy or an order of the court. M-to-M transfers also are available to white students enrolled in predominately white schools who desire to transfer to a predominately black school.

Magnet programs were instituted in the early 1980's. A performing arts, two science, and foreign language magnet programs were offered.[38] These programs were located in schools in the middle of the school district to better draw both white and black students residing in the northern and southern portions of the school district.

In addition, racially integrated "experience programs" were offered in areas such a writing for fifth and seventh graders, a driving range, summer school programs, and a dialectical speech program. Measures were employed by the DCSD to control the racial mix in each of these programs to insure that they would be operated on a desegregated basis.[39]

Finally, it is significant to note that the Court observed that "only infrequent and limited judicial intervention into the affairs of [the DCSD][]" had been required during the period of judicial supervision.[40] This served as further evidence of a pattern of substantial compliance over the years with the court's orders.[41]

These combined actions, and the lack of a need for constant judicial intervention, were deemed sufficient by the Court to show that the DCSD had "achieved the maximum practical desegregation from 1969 to 1986."[42]

Lower federal court decisions in the wake of *Freeman* provide additional examples. A few of them are discussed here. *Manning v. School Board of Hillsborough County, Florida,*[43] involved an appeal by a school district to a district court judgment denying a motion for unitary status. The school district had operated under a court imposed school desegregation order from the early 1970's until 1991 when a consent decree had been entered into by the parties and approved by the court. The consent decree modified the court's earlier order. It was to be implemented over a seven year

period. One of the major aspects of the consent decree was the elimination of sixth grade center schools. These were replaced by middle schools under the terms of the decree.

In 1994, the plaintiffs filed a motion to enforce the consent decree. The motion was referred by the court to a magistrate who recommended denying the motion. In response to the recommendation, the court deferred ruling on the motion and remanded the matter to the magistrate to consider of whether the school district had achieved unitary status and was entitled to termination of judicial supervision. The motion was tried before the magistrate in 1996. In 1997, the magistrate recommended to the court that it find the school district unitary and terminate judicial supervision.

Testimony was offered and considered by the magistrate on the issue of good faith in accordance with *Freeman*. Based upon the testimony, the magistrate judge concluded the school district had complied in good faith with the court's decree. Testimony was offered by the superintendent, the school board's chairman and several of its members. The testimony of the school district witnesses was found to show a commitment to Fourteenth Amendment principles. The superintendent testified "he felt 'a moral and legal obligation on the school system to continue a desegregated school system.'"[44] The chairman of the school board testified the school board was "going to guarantee that students will receive [an] equal education."[45] School board members "expressed no misgivings about . . . the intent and ability of the School Board to continue a desegregated school system while receiving input from all members of the community."[46]

In addition, a twenty-five year history of compliance with the court's orders was observed by the magistrate. Not once had the school district been found in violation of any court order. Furthermore, the magistrate found the school district had regularly conferred with the plaintiffs "to ensure that the school system was moving forwards, not backwards, toward compliance with the [c]ourt's orders."[47]

Based upon this evidence, the magistrate concluded the action of the school district "demonstrates that [the school board has] accepted the principle of racial equality and will not revert back to a dual school system."[48]

However, the district court rejected the magistrate's recommendation. On appeal, the court of appeals' discussion of the good faith requirement focused on factors such as a) the school district's history of *never* violating a court order; b) the school district had never been sanctioned; and c) the school district had consulted extensively with the black community, including the plaintiffs, prior to implementing new student assignments under the 1991 consent decree.[49] In addition, the court noted magnet programs had been adopted specifically to reduce racial isolation and to promote desegregation, that a multi-cultural curriculum for students in all grades had been proposed and that special in-servicing for teachers was provided to enable them to deal with diverse student populations.[50] The court went on to note "a court should not dwell on isolated discrepancies, but rather should 'consider whether the school board's policies form a consistent pattern of lawful conduct directed to eliminating earlier violations.'"[51] The district court's ruling was reversed and the case was remanded for further proceedings before the district court judge.

The school district's history of compliance, the use of magnet programming, and its regular discussions with the "African-American" community were sufficient to demonstrate to those on whose behalf the case had been filed that the school district had made a commitment "to the whole of the court's decree and to those provisions of the law and the constitution that were the predicate for judicial intervention in the first instance."

In *Lockett v. Board of Education of Muscogee County School District,*[52] the court of appeals observed that

> A good faith commitment to a desegregation plan also demonstrates to parents, students, and the public that students will no longer suffer injury or stigma. At the same time, it "enables the district court to accept the school board's representation that [the school board] has accepted the principal of racial equality and will not suffer intentional discrimination in the future." To determine if a school board has shown a good faith commitment to a desegregation plan, a district court should, among other things, consider whether the school board's policies "form a consistent pattern of lawful conducted directed to eliminating earlier violations." (citations omitted.)

The court went on to observed that the school board had a history of a) having never been enjoined or sanctioned; b) having never failed to comply with a court order; c) taking actions to further desegregation above and beyond what was required in the court's plan; d) taking unsurpassed actions to maintain the highest levels of desegregation within its schools of any school system in the nation; e) successfully implementing magnet programs which had desegregated schools; f) consulting with both white and black citizens prior to adoption of a neighborhood student assignment plan; and g) implementing a majority-to-minority student transfer plan to offset any negative racial impact of the neighborhood student assignment plan.[53] This conduct was found sufficient to support a finding of good faith.

Reed v. Rhodes[54] involved a motion to modify a consent decree and terminate judicial supervision over student assignments in the Cleveland Public School System. After citing *Freeman* and noting the necessity that a school district must have

> demonstrated, to the public and to the parents and students of the once disfavored race, its good faith commitment to the whole of the court's [seminal remedial order] and to those provisions of the law and the constitution that were the predicate for judicial intervention in the first instance[,][55]

the court observed the school district had not only complied with the student assignment plan to the extent practicable but, also, that it had implemented

> far more demanding compliance requirements . . .to override the demographics of the City of Cleveland. In addition to extensive student attendance, zone boundary changes and clustering, provision for minority-to-minority transfers, magnet schools, and community schools, the District also implemented one of the nation's most extensive and arduous programs of mandatory student reassignments and transportation. The District reassigned students annually during this period to ensure that schools that had fallen out of compliance due to population mobility within [the] District were returned to compliance within the ± 15% requirement.
>
> A comparison of the Cleveland School District's compliance with the student assignment component of the Remedial Order as incorporated into the Consent Decree with the history of compliance approved by the Supreme Court in *Freeman* compels the conclusion that the Cleveland District achieved "full and satisfactory" compliance with court-imposed requirements during the relevant periods.[56]

CONCLUSION

What has remained consistent throughout the development of the good faith requirement is the need for *voluntary* action. A history of compliance with the orders of the court, punctuated by minimal judicial intervention into the affairs of a school district; the adoption and implementation of school board policies demonstrating a consistent pattern of lawful conduct; the use of M-to-M transfers and magnet programming to reduce racial isolation; regular communications between the parties and members of the African American community, all require *voluntary* action and serve to evidence good faith by demonstrating

> *to the public and to the parents and students of the once disfavored race, its good faith commitment to the whole of the court's decree and to those provisions of the law and the constitution that were the predicate for judicial intervention in the first instance.*

In short, the long journey to unitary status cannot be completed where a school district's compliance is constantly coerced by judicial edict or the intercession of others acting on behalf of the court to fashion policies compliant with the law. A history of foot-dragging and contentiousness, with the concomittant need for frequent judicial intervention, cannot demonstrate acceptance of the principle of equality embedded in the Fourteenth Amendment or demonstrate to the court that once judicial supervision is terminated that it will be unlikely that a school district would return to its former ways.

FOOTNOTES

1. Charles L. Patin, Jr. is a partner with the Baton Rouge law firm of Kean, Miller, Hawthorne, D'Armond, McCowan and Jarman, L.L.P. Mr. Patin successfully negotiated the consent judgment in "Valley, et al. v. Rapides Parish School Board," and serves as lead desegregation attorney for the Rapides Parish School Board.

Prior to joining the Kean, Miller law firm in 1989, Mr. Patin served as Chief of the Civil Division of the Louisiana Department of Justice for several years, followed by a short tenure as chief litigation attorney on the legal staff of former Governor Buddy Roemer.

Dr. William M. Gordon is a well recognized school desegregation expert and consultant with over 30 years of experience. He has provided expert and consulting services for a number of school districts and state departments of education, as well as plaintiff groups and the United States Department of Justice in numerous cases. He has been appointed to serve as an expert by several courts and has been appointed by other courts to serve as a desegregation plan compliance monitor. Dr. Gordon has designed several school desegregation plans during his career. He presently serves as a desegregation consultant and expert for the Rapides Parish School Board and has been, or is currently, involved in several other school districts in Louisiana.

Dr. Gordon also has substantial experience in the field of education. He formerly taught and served as a principal at the elementary and middle levels, and, at the university level, as a Professor of Educational Leadership at Wright State University in Dayton, Ohio. He has frequently appeared as a guest lecturer at universities around the world.

In addition, he has published numerous articles and co-authored several books in the area of school desegregation.

2. 503 U.S. 467, 118 L. Ed. 2d 108, 112 S. Ct. 1430 (1992).

3. *Id.* at 491.

4. *Brown v. Board of Education of Topeka, (Brown II)* 349 U.S. 294, 99 L. Ed. 1083, 75 S. Ct. 753 (1955).

5. *Id.* at 300.

6. *Brown v. Board of Education of Topeka, (Brown I)* 347 U.S. 483, 98 L. E. 873, 74 S. Ct. 686 (1954).

7. 349 U.S. at 299 and 301.

8. *Id.* at 299.

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9. *Id.* at 298.

10. *Freeman,* 503 U.S. at 472.

11. 391 U.S. 430, 20 L. Ed. 2d 716, 88 S. Ct. 1689 (1968).

12. *Id.* at 438, citing *Griffin v. County School Board,* 377 U.S. 218, 234, 12 L. Ed. 2d 256, 84 S. Ct. 1226 (1964).

13. *Green,* 391 U.S. at 439.

14. *Id.*

15. *Id.* at 438.

16. *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 18, 28 L. Ed. 2d 554, 91 S. Ct. 1267 (1971).

17. *Freeman,* 503 U.S. at 482.

18. *Id.* 503 U.S. at 486.

19. *Swann,* 402 U.S. 1, 15.

20. 498 U.S. 237, 112 L. Ed. 2d 715, 111 S. Ct. 630 (1991).

21. 498 U.S. at 249-50. See *Coalition to Save Our Children v. State Board of Education of State of Delaware,* 90 F.3d 752, 760 (3rd Cir. 1996) (observing "the phrase 'to the extent practicable' implies a reasonable limit on the duration of . . . federal supervision").

22. See *Manning v. School Board of Hillsborough County, Florida,* ___ F.3d ___ , 2001 WL 264977, at p. 11 (11th Cir. (Fla.)) (citing *Freeman* and observing "For a district court to determine whether the vestiges of discrimination have been eliminated to the extent practicable, it must examine the six *Green* factors . . . . *Using its discretion, a court may also consider other facets*[] (emphasis supplied")). In *Freeman* the use of this discretion was utilized to cite discrimination in the assignment of experienced and advanced degree teachers as a lingering vestige of the former dual system.

23. 503 U.S. at 486.

24. *Id.* at 490.

25. *Id.* at 485.

26. *Id.* at 491.

27. *Id.* at 498.

28. *Morgan v. Nucci,* 831 F.2d 313, 321 (1st Cir. 1987), cited with favor in *Freeman,* 503 U.S. at 498-99.

29. *Dowell,* 498 U.S. at 248-49 (observing a desegregation decree may be dissolved after compliance for a "reasonable period of time;" the Court further observed that the "passage of time enables the district court to observe the good faith of the school board in complying with the decree").

30. See *Lee v. Etowah County Board of Education,* 963 F.2d 1416, 1422 (11th Cir. 1992) (observing "the district court must retain jurisdiction for a period of time after the school system has implemented a desegregation plan, to guard against the possibility of recurring constitutional violations, and to ensure the achievement of the ultimate goal — a unitary public school system in which the state does not discriminate between children on the basis of race. After a period of time sufficient to achieve these objectives has elapsed — *this court has required a period of not less than three years* — a district court may terminate a desegregation case by holding a hearing to determine if the school system has achieved unitary status" [emphasis supplied]); see also *United States v. Texas Education Agency,* 647 F.2d 504, 508-09 (5th Cir. 1981) *cert. denied,* 454 U.S. 1143, 71 L. Ed. 2d 295, 102 S. Ct. 1002 (1982) (observing district courts must retain jurisdiction in school desegregation cases "for a period of not less than three years" to insure proper implementation of a desegregation plan).

31. *Freeman,* 503 U.S. at 491.

32. In the area of faculty assignments, care should be taken to assure the non-discriminatory and proportional assignments of certified, advanced degreed and specialist certificated, and experienced teachers throughout a school system.

33. *Singleton v. Jackson Municipal Separate School District,* 419 F.2d 1211 (5th Cir. 1969).

34. 503 U.S. at 471.

35. See *Green,* 391 U.S. at 439.

36. *Freeman,* 503 U.S. at 479.

37. *Id.*

38. *Id.*

39. *Id.* at 479-80.

40. *Id.* at 473.

41. Frequent contentious litigation, whether initiated by plaintiffs contending a school district is not fulfilling its obligations under the court's orders or whether initiated by a school district seeking to avoid, or narrow the scope of, its obligations, is not conducive to a finding of a history of good faith compliance.

42. *Id.* at 480.

43. ___ F.3d ___ , 2001 WL 264977 (11th Cir. (Fla.)).

44. *Id.* at 9.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. An example of how such communication may be facilitated in the context of a consent judgment is language found in the recent Consent Judgment approved by the court in *Valley, et al. v. Rapides Parish School Board,* Civil Action No. 10946, USDC W. D. La. It requires formation of a "working group" composed of school district personnel and citizens of the parish selected by counsel for plaintiffs and plaintiff-intervenor.

50. *Manning,* 2001 WL 264977 at 6.

51. *Id.* at 14.

52. 111 F.3d 839, 843 (11th Cir. 1997).

53. 111 F.3d at 843-44.

54. 934 F. Supp. 1533 (N.D. Ohio 1996), *affirmed,* 179 F.3d 453 (6th Cir. 1999).

55. *Id.* at 1548.

56. *Id.* at 1550-51.

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